

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

119094

**FILE:**

**B-204702**

**DATE: July 29, 1982**

**MATTER OF:**

**Zarn, Inc.**

**DIGEST:**

1. A bid sample requested and furnished after bid opening may not be used to determine bid responsiveness, which must be determined based on the bid submission itself and not on a submission after the bid opening.
2. Unsolicited samples previously furnished to contracting agency by bidder in order to acquaint agency with bidder's product may not be used by agency to determine responsiveness of bid.
3. Where bidders were required to demonstrate experience in providing service of approximately the same type as that specified, and bidder listed users of prior similar model specified but failed to list users of actual model offered agency may not reject bid as nonresponsive.
4. Nonresponsibility determination based upon report of conversation with prior user of protester's product, that its experience with protester's product was less satisfactory than with competing products, is not supported where protester submits uncontested statement from that prior user concerning the conversation which contradicts those assertions.

Zarn, Inc., protests the rejection of its bid under invitation for bids No. 0481-AA-72-0-1-R0, issued by the District of Columbia to procure mobile trash collection carts. We sustain the protest. However, we are unable to grant Zarn's request for bid preparation costs because such a request is essentially a claim against the District and we do not settle claims against the District. See, e.g., 36 Comp. Gen. 457, 58 (1956); B-199477, May 3, 1982.

On April 17, 1981, the District invited bids for 60,000 wheeled trash collection carts (capable of accommodating a minimum load of 180 pounds each) for distribution to District households, together with 60 mechanical lifts for emptying the carts into garbage trucks. Under the heading "Qualification of Bidders" the solicitation required that bidders should "demonstrate experience in having performed a service of the same type (furnishing trash collection carts) and approximately the same size described in this specification and shall furnish \* \* \* the customers who are currently using this service." Bidders were warned that no contract would be awarded to any bidder who was not qualified due to an unsatisfactory performance record or inadequate experience. The IFB also provided that the "[c]ontractor agrees to provide a sample \* \* \* within one week should it be requested for purposes of bid evaluation." Bids were opened May 7, and the two lowest bids were as follows:

<u>Firm</u>	<u>Total Price</u>
Zarn, Inc.	\$2,221,500
Rubbermaid Applied Products, Inc.	2,236,000

On May 8, Zarn was asked by the District to furnish a sample cart and Zarn did furnish a sample of its new "Roll-A-Waste V" model, which it had bid.

Thereafter, the user organization, the District's Department of Environmental Services (DES) concluded that Zarn's bid was nonresponsive and that Zarn was not a responsible bidder. DES found Zarn nonresponsive because of defects in the Zarn bid sample and also because the cart offered by Zarn was a new product and not the same product as that previously produced by Zarn for the other cities listed in the Qualification of Bidders paragraph of its bid. Specifically, DES found that Zarn's cart was defective and its bid non-responsive because: 1) the lid fit improperly and would not open to deposit the contents in the truck hopper, and 2) "the back of the container body caught so that the lid did not continuously lap over the outside-container body edges or close properly." Also DES found that the latch was bent and did not fit properly.

Further, DES questioned Zarn's ability to produce the new cart because of defects found in the six test carts Zarn had given the District for use in a prior pilot program as well as with Zarn's bid sample cart. DES then reported that:

"Since the District's experience was admittedly limited to six field test containers and the bid sample, the department contacted Memphis, Tennessee which has the first major installation (60,000 containers) of Roll-A-Waste V product line delivered in early 1981. As of July 30, 1981, Memphis was experiencing the same lid problems on approximately 11,000 of its containers \* \* \*. Zarn, Inc. is working on a solution with them and at this time has recommended that the city make four 3" cuts into the rear corners of the container body to allow a proper lid fit.

\* \* \* \* \*

"\* \* \* the District questions the responsibility of the Roll-A-Waste V product line and finds it likely that additional administrative costs would exceed the \$14,700 margin by which Zarn was low bid. For example, although the District does not feel that slicing into the containers is an adequate solution to the lid problem, the personnel cost of just one laborer would exceed \$17,000 annually, not to mention warranty administration and citizen liaison costs of such a problem. The District cannot afford to take the risk of designing a once-a-week collection system around an unproven product line, nor pay the price of 'working out the bugs' as it goes along."

On September 3, 1981, the District awarded the contract to Rubbermaid and advised Zarn that its bid had been rejected due to defects in its bid sample. Zarn's protest followed.

Zarn argues that the rejection of its bid was unreasonable. It argues that under § 2620.5 G.4.6 of the District

of Columbia Procurement Regulations (DCPR), the invitation must list all characteristics to be examined in bid samples. Zarn further argues that there was no requirement in the solicitation that the product bid be identical to that sold to other cities and maintains that the District's handling of the procurement shows a clear bias against Zarn. In view of these alleged procedural defects, Zarn requests that either the District's award to Rubbermaid be set aside or bid preparation costs be awarded to Zarn.

We agree with Zarn that the District improperly rejected its bid.

As indicated above, the District determined the bid to be nonresponsive mainly because Zarn's bid sample was defective. The regulation cited above defines a bid sample as a sample required by the solicitation to be furnished by a bidder as part of its bid to show the characteristics of the product offered. The regulation provides that such samples will be used "only for the purpose of determining the responsiveness of the bid and will not be considered on the issue of a bidder's ability to produce the required items." DCPR § 2620.5.G.1. The regulation goes on to provide that bid samples "must be furnished as a part of the bid and must be received before the time set for the opening of bids." Section 2620.5.G.5a. Moreover, the regulation states that the invitation shall list all of the characteristics for which the sample will be examined. DCPR § 2620.5.G.2.

The District's regulations concerning bid samples are consistent with those applicable in the case of Federal procurements. See, for example, Federal Procurement Regulations (FPR) § 1-2.202-4. Under the bid sample clause prescribed for use in FPR § 1-202.4(e), a bid sample must be furnished as part of the bid and must be received before the time set for opening of bids (except as permitted under the provision in the solicitation governing

late bids for reasons not pertinent here). Also, the solicitation must list the characteristics of the sample which are to be examined. Here the bid sample was requested and submitted after bid opening. It is a fundamental rule of formal advertising that the responsiveness of a bid must be determined based on the bid submission itself and not on the basis of post-bid opening submissions. To require a bidder to submit a bid sample after bids are opened is tantamount to requiring the submission of another bid after all the bids are opened. This is not permitted under the rules of formal advertising. Kaufman DeDell Printing, Inc., B-181231, March 24, 1975, 75-1 QPD 172.

Therefore, the District could not properly determine the responsiveness of Zarn's bid based on a bid sample submitted after bid opening. Similarly, the District could not determine responsiveness based on unsolicited samples which Zarn submitted prior to the procurement in order to acquaint the District with its product. As stated in DCPR § 2620.5.G.6, unsolicited samples will be disregarded in the bid evaluation unless it is clear from the bid submission that it was the bidder's intention so to qualify the bid. Zarn did not indicate in its bid that the unsolicited samples qualified its bid, and indeed the District does not make this argument.

The other ground advanced by the District for its finding of nonresponsiveness is that Zarn's bid did not contain any listing of a prior user of the new product offered in its bid. We also find this ground of rejection to be improper. In the first place, the solicitation did not contain any such requirement. Secondly, the solicitation listing requirement, such as it was, clearly pertained to the matter of bidder responsibility, and not bid responsiveness. The solicitation paragraph provided that:

"The bidders shall demonstrate experience in having performed a service of the same type and approximately the same size described in the specification \* \* \*."

Thus, the solicitation did not require prior experience with exactly the same product but rather experience with the same type and size of project. The District does not state that Zarn's listed projects were not of the same type and size as this procurement.

Moreover, the listing requirement was for the stated purpose of determining whether the bidder was qualified. It had nothing whatever to do with the question of whether Zarn promised to perform the contract in accordance with the terms of the solicitation, which is the relevant question in determining whether a bidder is responsive. M-S and Associates, B-183282, May 14, 1975, 75-1 CPD 296. The information in the listing requirement may be used only to determine whether the bidder is qualified, i.e., responsible. See Dover Elevator Co., B-194679, November 8, 1979, 79-2 CPD 339.

Thus, since the sample submitted after bid opening could not properly be evaluated and since the unsolicited samples which had been earlier supplied by Zarn could not be considered in evaluating the bid, we find no basis for rejecting the bid as nonresponsive.

We next turn to consider the District's finding regarding Zarn's responsibility. Zarn argues that in fact the District found it to be a responsible bidder by acknowledging that the firm was financially secure, had been operating successfully for almost 10 years and had demonstrated a good faith effort to work problems out. It argues that whatever doubts the District initially had about Zarn's responsibility were resolved in Zarn's favor since the rejection of Zarn's bid was based solely on responsiveness.

We do not agree. There is nothing in the record to indicate that the District had a change of heart between the time of the DES evaluation and the time of award regarding Zarn's responsibility. It is true that the District's letter notifying Zarn of the award to Rubbermaid stated only that Zarn's product was not responsive to the specifications. Also, a District document designated "Reasons for Rejection of Bids" listed the defects found in Zarn's sample as the reason for rejecting Zarn's bid. On the other hand, the District's report on the protest repeats the DES findings relative to Zarn's responsibility.

Thus, it appears that since the District found Zarn's bid nonresponsive, it did not deem it necessary to refer to Zarn's responsibility when it advised Zarn that its

bid had been rejected. In view of our conclusion concerning the District's findings of nonresponsiveness, we will consider the District's/DES' findings relative to Zarn's responsibility to determine whether they support the rejection of Zarn's bid. 45 Comp. Gen. 4, 6 (1965).

Essentially the District found that Zarn was non-responsible because all of the models furnished by Zarn to the District were defective, and it was further reported that Zarn's product had also been found defective by the City of Memphis, (the first major purchaser of Zarn's new product). On this record the District concluded that Zarn had not demonstrated the ability to produce its new product successfully. In addition, the District noted that Zarn's bid was only \$14,700 lower than the next bid. The District believed that the additional administrative costs resulting from the necessary effort to correct the defects in Zarn's product would exceed the \$14,700 margin by which Zarn's bid was low. In short, the District felt that it should not take the risk of awarding this contract to a bidder offering "an unproven product line, nor pay the price of 'working out the bugs' as it goes along."

On the face of it, the District's report reasonably supports a finding of nonresponsibility. While the regulations prohibit the consideration of samples for the purpose of determining a bidder's ability to produce the required item, the District did not limit its inquiry as to Zarn's responsibility to the samples. It contacted Memphis to determine whether that city was experiencing the same problems with the Zarn product as was the District. As a prudent buyer, the District acted reasonably in so doing.

Our difficulty with the District's finding derives from its statement of what Memphis reported. According to the DES, Memphis reported that it was experiencing the same lid problems on about 11,000 of 60,000 containers delivered by Zarn.

However, Zarn has introduced a letter dated October 22, 1981, from Mr. Claude L. Pearson of the Memphis

Sanitation Department to the District concerning DES' statement of what Memphis reported. Mr. Pearson states that he was the Memphis official contacted by DES and that the purpose of his October 22 letter is to "clear up one point on which I feel the City of Memphis has been misrepresented." He goes on to state:

"It is stated in your report that 'Memphis was experiencing the same lid problems on approximately 11,000 of its containers.'" In reviewing my file notes, it was indicated in my conversation that we were in fact experiencing some lid problems on the Zarn Roll-A-Waste V container from a 'batch' of 11,000 containers that had been installed in the Raleigh area of the City of Memphis. That does not imply that 11,000 containers are defective, but that we were experiencing out of those 11,000 containers that had been installed some lid problems.

"Initial identification indicated some 200 lids that were problem lids. As a quick solution Zarn had recommended the slicing of the containers, as you had indicated in your report, but it was found first by Zarn as being unacceptable and subsequently in a trial on a couple of containers it was found to be unacceptable by the City of Memphis as a solution. Zarn, Inc. has agreed to replace all defective container lids and provide a more permanent solution to any possible problem in the future.

"The City of Memphis purchased, and has in place, approximately 40,000 Zarn Roll-A-Waste V containers, and as indicated we are experiencing problems with just a small amount of lids on those containers.

"File notes indicate that further in our conversation I relayed that we are experiencing problems with the other containers that are installed in the City of Memphis, such as the Rubbermaid Mobil Toter and the P.P.I. Polycart. The problem



indicated on the Rubbermaid container was a flaring on the lid identified by a local colloquialism of a 'batwing' effect. In addition, we were having some difficulty with the catch bar on the Rubbermaid container that was pulling through the body of the container, evidently due to this catch bar being approximately one-half inch shorter than the ones we had installed during the pilot program. These matters have been discussed with Rubbermaid and are being corrected. The initial amount of problems we were having with the Rubbermaid lids were approximately 800 lids identified with the flaring problem, out of approximately 56,000 containers installed.

\* \* \* \* \*

"My concern is that it appears from reading the report that we were only having problems with the Zarn Roll-A-Waste container; however, we are finding that we are having some type of problem with all the containers installed, which is to be somewhat expected since we initially figured about a one percent defect or failure on containers on the part of all the manufacturers. To be emphasized, all the manufacturers have been most cooperative in honoring their commitment to replace or repair those defective containers and various components on the containers to see to it that the City of Memphis is afforded a quality cart."

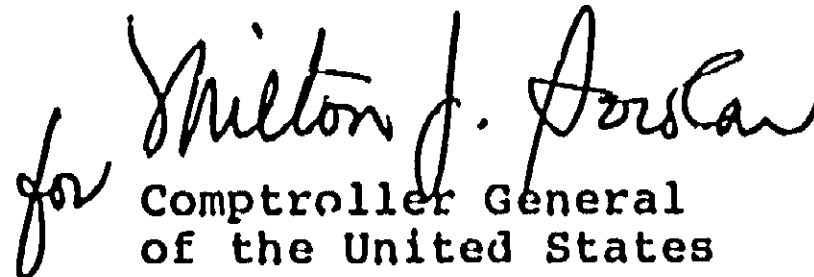
Since the District has not contested Mr. Pearson's letter, it appears that the information contained in the District report concerning Zarn's performance under the Memphis contract was substantially inaccurate. According to Mr. Pearson only 200, not 11,000, Zarn lids were a problem and Zarn has agreed to replace them. Mr. Pearson states that other firms, including Rubbermaid, also have had problems with their products to the same extent as Zarn. As noted above, Mr. Pearson states that some 800 out of approximately 56,000 Rubbermaid lids had problems. Thus, Rubbermaid's problem rate in Memphis is not significantly lower than Zarn's. Based on this information, there is no reason to consider the Rubbermaid product any more reliable than Zarn's product.

In light of the above, we find no support for the District's conclusion that Zarn had not demonstrated the capability to produce problem-free carts. Since Zarn had furnished thousands of problem-free carts to the City of Memphis during the same period of time, the District's finding that Zarn was an nonresponsive and unreliable source for the product is not supported merely because of a few defective carts furnished to the District.

Moreover, the District's assumption that Zarn's \$14,700 lower price would be offset by costs of "working out, the bugs" becomes questionable in light of Memphis' experience. In the first place Memphis did not detect any appreciable difference in problem rate between Zarn and Rubbermaid. Secondly, Zarn has taken the responsibility for correcting product defects in the case of the Memphis contract. We see no reason why the District would not have had the same response from Zarn.

Accordingly, we find that Zarn's bid was improperly rejected. Since the contract has been substantially completed, however, no remedial relief is available in this case.

The protest is sustained.

*for*   
Comptroller General  
of the United States